

OPINION SUMMARY

MISSOURI COURT OF APPEALS EASTERN DISTRICT

DIVISION FOUR

STATE OF MISSOURI,)	No. ED101542
)	
Appellant/Cross-Respondent,)	Appeal from the Circuit Court
)	of the City of St. Louis
vs.)	
)	Honorable Jimmie M. Edwards
AMERICAN TOBACCO CO., ET AL.,)	
)	
Respondents/Cross-Appellants.)	FILED: September 22, 2015

The State of Missouri ("Missouri") appeals from the trial court's Amended Order and Judgment denying Missouri's motion to vacate the Non-Diligence Award and confirming the Final Award entered in the 2003 Non-Participating Manufacturers' ("NPMs") Adjustment Arbitration. Missouri also appeals from the trial court's judgment denying Missouri's motion to compel a single-state arbitration between only it and the Participating Manufacturers ("PMs") of cigarettes and other tobacco products, which entered into a Master Settlement Agreement with Missouri and 51 other States and U.S. Territories, to determine whether Missouri diligently enforced its "Qualifying Statute" in 2004. The PMs cross-appeal from the trial court's modification of the Settlement Award, ordering the Independent Auditor to treat the twenty Signatory States whose diligence was contested, but not required to be proven, as non-diligent when calculating the NPMs' Adjustment applicable to the amount owed to Missouri for 2003.

REVERSED AND REMANDED.

Division Four Holds: Under the Master Settlement Agreement, the PMs were required to pay the States each year based on their relative market share, subject to a number of adjustments calculated by an Independent Auditor ("IA"). At the center of this dispute is the NPM Adjustment, which can reduce payments to the States if two conditions are met: the PMs suffer a "Market Share Loss" nationally and the IA finds that the MSA was a significant factor contributing to that national Market Share Loss. States can avoid the reduced payment if they diligently enforce a Qualifying Statute. The case went to binding arbitration on the issue of States' diligent enforcement for 2003, and prior to the arbitration panel's determinations, twenty-two states signed a partial settlement with the PMs. Accordingly, the arbitration panel ("Panel") directed the IA to implement the provisions of the partial settlement and ordered the 2003 NPM Adjustment to be allocated among the Non-signatory States by reducing the dollar amount by a percentage equal to the aggregate allocable shares of the Signatory States as of the date of the Panel's Final Award. Thus, the Signatory States' shares are reallocated among all Non-signatory States that did not diligently enforce a Qualifying Statute during 2003, on a *pro rata* basis. On review, the trial court found that the Panel's conclusion that the pro rata adjustment complied with the MSA and was the equitable way to determine the reallocation method was "clearly

erroneous as it violates the MSA's procedure for amending the MSA." We hold that the Panel construed the MSA just as it was authorized to do under the MSA to resolve the dispute regarding the NPM Adjustment in light of the partial settlement. Under the limited standard of review provided in Oxford Health Plans LLC v. Sutter, 133 S.Ct. 2064, 2068 (2013), the trial court erred in vacating and modifying the Panel's award.

Additionally, the trial court denied Missouri's motion to compel single-state arbitration for 2004. While Missouri agreed to national arbitration in 2003, its signed Agreement to Arbitrate, which was separate from the MSA, is evidence that the parties did not envision nationwide arbitration in drafting the MSA. Further, the national arbitration experience Missouri had in 2003 demonstrates the conflict among the States, even though they are all on one "side" of the arbitration, infringes on their due process rights. Based on the parties' course of conduct and experience, we find the trial court erred in denying Missouri's motion to compel single-state arbitration for Missouri's 2004 diligent enforcement dispute because the MSA does not require nationwide arbitration.

The judgment of the trial court is reversed and remanded. The trial court is instructed to enter its judgment affirming the arbitration Panel's direction to the IA to implement the provisions of the partial settlement and order the 2003 NPM Adjustment to be allocated among the Non-signatory States using a *pro rata* method. The trial court is further instructed to grant Missouri's motion to compel single-state arbitration between Missouri and the PMs for a determination of diligent enforcement of a Qualifying Statute for 2004.

Opinion by: Roy L. Richter, J.

Patricia L. Cohen, P.J., Robert M. Clayton III, J., concur.

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<p>THIS SUMMARY IS NOT PART OF THE OPINION OF THE COURT. IT HAS BEEN PREPARED FOR THE CONVENIENCE OF THE READER AND SHOULD NOT BE QUOTED OR CITED.</p>
